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RHB Bank Bhd v Puyang Laing (F)

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–402–03 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
3 AUGUST 2016

C

Civil Procedure — Setting aside — Order for sale — Senior assistant registrar granted appellant's application for order for sale of charged property belonged to respondent — Whether senior assistant registrar had jurisdiction and competent to issue order for sale

D

Land Law — Charge — Order for sale — Senior assistant registrar granted appellant's application for order for sale of charged property belonged to respondent — Whether senior assistant registrar had jurisdiction and competent to issue order for sale — Rules of the High Court 1980 O 32 r 9 — Land Code (Cap 81) s 148

E

The appellant filed an originating summons ('OS') for an order for sale for a charged property belonged to the respondent. The senior assistant registrar ('SAR') had granted the order for sale nevertheless, on an application by the respondent, the order was set aside by the trial judge, hence the present appeal. The issue for court's determination was whether the SAR had the jurisdiction and was competent to issue the order for sale.

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G **Held,** dismissing the appeal and affirming the learned trial judge's decision with liberty for a fresh application for order for sale be made by the appellant:

(1) Section 148 of the Land Code (Cap 81) clearly vests the function to hear application for granting order for sale on the learned judge. This includes power to hear evidence and it follows therefore the power to hear an application for an order for sale vests on the judge. Since there was no valid practice direction to empower SAR to hear the same, the power should remain so. In addition, Form No 57 of the Rules the of High Court 1980 ('the RHC') which states that the OS must be heard by a judge does not fall within the proviso 2 of O 32 r 9 of the RHC. In other words the jurisdiction to hear OS with notice of appointment to hear the OS could only be exercised by the judge, and not the SAR (see paras 15–16).

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[Bahasa Malaysia summary

Perayu memfailkan saman pemula ('SP') bagi perintah jualan untuk hartanah yang dicajkan yang dimiliki oleh responden. Timbalan pendaftar kanan ('TPK') telah membenarkan perintah untuk jualan walau bagaimanapun, atas permohonan oleh responden, perintah diketepikan oleh hakim perbicaraan, maka rayuan ini. Isu untuk penentuan mahkamah adalah sama ada TPK mempunyai bidang kuasa dan adalah kompeten untuk mengeluarkan perintah jualan.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim perbicaraan yang bijaksana dengan kebebasan untuk permohonan baru bagi perintah jualan yang dibuat oleh perayu:

(1) Seksyen 148 Kanun Tanah (Cap 81) jelas meletakhakkan fungsi untuk mendengar permohonan untuk memberikan perintah jualan kepada hakim yang bijaksana. Ini termasuk kuasa untuk mendengar keterangan dan oleh itu kuasa untuk mendengar permohonan bagi perintah jualan diletakkan kepada hakim. Memandangkan tidak terdapat arahan amalan yang sah untuk memberi kuasa kepada TPK untuk mendengarnya, kuasa patut kekal sedemikian. Selanjutnya, Borang No 57 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang menyatakan bahawa SP mesti didengar oleh hakim tidak terangkum dalam peruntukan 2 A 32 k 9 KMT. Dalam perkataan lain, bidang kuasa untuk mendengar SP dengan notis pelantikan untuk mendengar SP hanya boleh dilaksanakan oleh hakim, dan bukan TPK (lihat perenggan 15–16).]

Notes

For cases on order for sale, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2844–3016.

Legislation referred to

Courts of Judicature Act 1964 s 16(e)
Land Code (Cap 81) s 148
National Land Code s 257
Rules of Court 2012 O 92 r 3(b)
Rules of the High Court 1980 O 28 r 2, O 32, O 32 r 1, O 32 r 9, O 83, O 89, Forms 6, 7, 8, 8A, 57, 62

Appeal from: Originating Summons No 24–333 of 2010-III (High Court, Kuching)

Louis Achuk (Francisca Sharon with him) (Kadir Wong Lin & Co Advocates) for the appellant.
Wong King Wei (Clement Wong with him) (King Wei & Clement) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak sitting at Kuching dated 31 July 2014. We have heard the appeal on 20 August 2015 and we have dismissed the appeal and affirmed the decision of the learned trial judge.

[2] The facts of the case were not in dispute. The appellant filed an originating summons ('OS') dated 29 October 2010 against the respondent. The said OS was for an order for sale for a charged property belonged to the respondent described as, Lot 1616 Block 12 Kuching Central Land District ('the property'). The senior assistant registrar, Puan Zubaidah bt Sharkawi had granted the order for sale in respect of the property on 6 January 2011. The property was then sold by public auction through a public tender.

[3] The respondent through her husband had lodged a private caveat on the property and filed an application to set aside the order for sale, which was allowed by the High Court. The order for sale was set aside as Her Ladyship found the senior assistant registrar ('SAR') was not competent to issue the said order for sale.

[4] The sole issue for the determination before us was whether the SAR has the jurisdiction and was competent to issue an order for sale.

[5] Generally speaking, a court is and shall be deemed an open and public court. However the Rules of Court may be made, inter alia, for prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by judges in court or in chambers, and what may be transacted or exercised by registrars (see s 16(e) of the Courts of Judicature Act 1964).

[6] Order 32 of the Rules of the High Court 1980 ('the RHC') is a specific order that deals with proceedings in chambers. Pursuant to O 32 r 9 of the RHC, the registrar can only do what a judge can do in chambers but not what a judge can do in an open court. The said O 39 r 2 provides in the following terms:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or those rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may be by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

[7] The power of the registrar, to exercise the authority and jurisdiction of a judge in chamber found in O 32 r 9 is subjected to two provisos namely: A

(a) such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted by a judge in person; or

(b) as may by any of these rules be expressly directed to be transacted or exercised by a judge in person. B

[8] Under O 32 r 1 every application in chambers must be by summons in Form No 62. Naturally Form No 62 spells out for the parties to appear or attend before the judge or registrar in chambers. Order for sale is specifically dealt with under O 83. Under O 83 the action may begin either by writ or originating summons. The application for order for sale in the instant appeal was made by the appellant by way of OS. C

[9] It is to be noted that O 28 r 2 deals specifically with OS. There are four types of forms prescribed for the purposes of OS. Form No 6 is used where appearance is required and where no appearance is required Form No 7 will be used. Form No 8 is for ex parte OS and Form No 8A is for possession under O 89. In the case of application for order for sale, it requires appearance. So it is a case of an OS using Form No 6. Under O 28 r 2 Form No 57 is required to give notice of hearing in an OS application for an order for sale. Form No 57 which serve to give notice must be sealed with the seal of the court. D E

[10] It would appear that an OS which requires no appearance may be heard before a judge or a registrar because on both Form No 7 and Form No 8 there is option which states as '… before the Judge (or Registrar) in Chambers on …'. Whereas OS requiring appearance as in Form No 6 or Form No 8A no such option is provided. In such absence there would be no option but the parties are to appear before a judge and not SAR or registrar. F G

[11] In the current appeal too, the prescribed Form No 57 states that the OS will be heard by the judge in chambers. Form No 57 does not contain similar content that parties are to appear either before a *judge or registrar* but only before a judge instead. On this reason the learned High Court judge found that the registrar is ceased with the power to hear an OS in this appeal. Her Ladyship found that Form No 57 in this case, being a prescribed form by the Rules would form part of the Rules, and has the same effect as the Rules. H

[12] There is a Practice Note No 2 of 1987 issued by the Registrar of the High Court of Malaya which states in clear terms that SAR has no power to grant order for sale of land because it would contradict s 257 of the National Land Code ('the NLC'). It is clear that such Practice Note is not applicable to the State of Sarawak since NLC has no application there. Instead the applicable I

land law is the Sarawak Land Code (Cap 81). We therefore agree with the learned trial judge that the Practice Note issued by the Registrar of the High Court of Malaya cannot apply to the present appeal.

[13] In his submissions before us learned counsel for the appellant had shown a written directive issued by the Registrar of High Court of Sabah and Sarawak. The directive issued dated 26 May 2010 in gist states that:

> Adalah dimaklumkan bahawa berkuat kuasa 3 Jun 2010 tuan/puan adalah diarahkan untuk mendengar kes-kes 'foreclosure' melalui 'Notice of Appointment to hear Originating Summons' untuk mendapatkan perintah jualan tanah bercagar (charged land) di Mahkamah tuan/puan.

[14] We agree with learned counsel for the respondent that the above directive does not assist the situation to overcome proviso 1 under O 32 r 9. This is because firstly under that proviso the directive must be by the Chief Justice. Further to that, such directive must be one to narrow the power of SAR and not to enlarge it.

[15] Further looking at O 92 r 3(b) of the Rules of Court 2012 the provision relating to practice directions, the procedure for issuing of practice directions have not been adhered to in this our appeal. Further s 148 of the Sarawak Land Code which we set out below:

> Section 148 Remedies for default
>
> (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the charge may give to the charge, his personal representatives or assigns, notice in writing that the charge will resort to all available remedies unless such default be remedied.
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> (2) If the charger fails to comply with the requirements of any notice lawfully given, the charge shall be at liberty to apply to the High Court:
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> (a) for an order entitling him to enter into possession and to be registered as proprietor of the charges land;
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> (b) to receive the rents and profits of the charged land; or
>
> (c) for the sale of the charged land
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> and the court after hearing the evidence may make such order as in the circumstances seems just.
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> Provided that where a licence for the establishment of a planted forest has been granted under section 65B of the Forest Ordinance [Cap. 126 (1958 Ed)] and a caveat has been lodged by the holder thereof against the land prior to the registration of the charge favouring the charge.
>
> (i) no relief shall be granted under this section unless and until a copy of the application made by the charge and all relevant document in

support thereof have been duly served on the holder of such licence; and

(ii) any order for the possession of the charged land or the sale thereof and any memorandum of transfer executed pursuant to section 150(3) shall be made expressly subject to the rights, interests and caveat of the holder of any licence for the establishment of a planted forest granted under section 65B of the Forest Ordinance [Cap. 126 (1958 Ed.)] unless such holder is the purchaser of the charged land.

[Ins. Cap A42]

(3) The notice under subsection (1) shall comply with the terms of the charge:

Provided that, without prejudice to section 145(4), if no period of notice for the purpose of this section is stipulated by the charge, not less than thirty days 'notice shall be given'.

clearly vest the function to hear application for granting of order for sale on the learned judge. This includes power to hear evidence and it follows therefore the power to hear an application for an order for sale vests on the judge. Since there was no valid practice direction to empower the SAR to hear the same, the power should remain so.

[16] Form No 57 which is used for the purpose of notice of appointment to hear the OS ('NATHOS') clearly states that the OS will be heard by a judge. Form No 57 which is a scheduled Form under the RHC and had the same effect and force of law as the Rules of Court as stated in the Malaysian Court Practice Note 2011 Desk Edition, High Court Practice 1 in para [1.7.1] with reference to 'Authority of Forms'. Thus Form No 57 which states that the OS must be heard by a judge does not fall within the proviso 2 of O 32 r 9 of the RHC 1980. In other words the jurisdiction to hear OS with NATHOS can only be exercised by the judge, and not the SAR.

[17] For the above reasons we agree with the decision of the learned High Court judge. We therefore dismiss the appeal and affirmed the decision of the learned trial judge, with liberty for a fresh application for order for sale be made by the appellant. We made no order as to costs.

Appeal dismissed; decision of learned trial judge affirmed with liberty for fresh application for order for sale be made by appellant.

Reported by Dzulqarnain Ab Fatar